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Via email: lcjc@sen.parl.gc.ca

The Honourable Bob Runciman
Chair
Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
40 Elgin Street, Room 1057
Ottawa ON K1A 0A4

Dear Senator and members of the Committee:

Re: Bill C-14 (An Act to amend the Criminal Code and other Acts)

The Canadian Medical Protective Association ("CMPA") welcomes the opportunity to participate in the consultation process held by the Standing Committee on Legal and Constitutional Affairs on Bill C-14. The CMPA recognizes the Government's challenges and efforts made to date to introduce legislation that provides a consistent framework for the delivery of medical assistance in dying ("MAID").

The CMPA is a not-for-profit mutual defence organization and is the principal provider of medical-legal assistance to its more than 93,000 physician members. The most obvious expression of the CMPA's assistance to its members is the provision of legal representation in medical-legal matters and risk management services related to the practice of medicine.

Members are already calling the CMPA with questions about MAID, including advice about patients who are seeking MAID. With that perspective, the focus of the CMPA's recommendations for amendments to Bill C-14 is to ensure the legislation provides clear eligibility criteria and effective safeguards for patients, while ensuring healthcare professionals are not exposed to criminal sanction for good faith participation in MAID.

Complying with Provincial Law and Standards (Subsection 241.2(7))

The CMPA recommends that subsection 241.2(7) be deleted. This subsection currently states that MAID must be provided "with reasonable knowledge, care and skill and in accordance with applicable provincial laws, rules or standards." The CMPA supports the premise that MAID should be delivered in accordance with provincial laws, rules and standards, but submits that this subsection does not belong in criminal legislation.

As currently worded, subsection 241.2(7) read in conjunction with section 241 would result in physicians being subject to criminal sanction for not having complied with a provincial standard, including standards that are merely administrative in nature. The exemption that no practitioner commits an offence if they provide a person with MAID in accordance with section 241.2 would therefore not apply to physicians who have breached subsection 241.2(7) (*i.e.* if the physician fell

below the standard of care in one aspect of the delivery of MAID).

Healthcare professionals are obligated to deliver care to patients in accordance with professional standards, even in the absence of such a provision. It is generally accepted that healthcare professionals who are negligent in the delivery of care may be subject to regulatory or civil proceedings. However, they should not face criminal sanctions for breaching the standard of care or failing to follow a policy created by a medical regulatory authority (College). Civil or regulatory standards should not form the basis for criminal offences.

Further, as currently worded, subsection 227(1) is unavailable to healthcare professionals who, acting in good faith compliance with provincial/territorial requirements, may fall below the standard of care. The good faith provision only applies to practitioners who provide MAID in accordance with section 241.2; therefore the exemption would not apply in the event of a breach of a provincial standard of care as contemplated in subsection 241.2(7).

Ensuring that well intended healthcare professionals acting in good faith are not subject to criminal sanctions for breaching the standard of care is important to ensure access for patients by encouraging the participation of practitioners in MAID.

Counselling a Person to Die by Suicide (Section 241)

Bill C-14 should be amended to expressly state that no practitioner is guilty of counselling a person to die by suicide by providing information about MAID in the course of considering possible medical options.

As currently worded, paragraph 241(1)(a) states that a practitioner is guilty of an indictable offence punishable by up to 14 years imprisonment for counselling or abetting a person to die by suicide. The exception proposed at subsection 241(2) provides that practitioners are not committing a criminal offence by aiding a person to die by suicide. However, it does not create an exception for counselling a person to die by suicide. Without such an exemption, it is unclear whether a physician who raises or discusses with a patient the option of MAID in the course of providing care might be in violation of the *Criminal Code* and subject to criminal sanction.

It is important that practitioners not fear criminal prosecution for raising MAID with their patients or discussing a patient's care with other healthcare professionals, where medically appropriate.

Clarity in Eligibility Criteria and Safeguard Requirements (Section 241.2)

The eligibility criteria for "grievous and irremediable medical condition" in subsection 241.2(2), and the requirement for practitioners to be "independent" in subsection 241.2(6), must be more clearly defined to ensure appropriate access to MAID and to protect vulnerable patients.

Bill C-14 should state unequivocally whether or not a patient must be at the end of life to be eligible to receive MAID. Uncertainty exists currently about the intended meaning of the requirement in paragraph 241.2(2)(d) that "natural death has become reasonably foreseeable, taking into account all

of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining." The *Legislative Background* document published by the Department of Justice states that "eligibility would not be limited to those who are dying from a fatal disease," but this is not clear from the current language of Bill C-14.

If it is intended that the patient need not be at the end of life, paragraph 241.2(2)(d) should be amended to state that "natural death has become reasonably foreseeable, whether or not death is imminent." Conversely, if it is intended for patients to be at the end of life, the provision should specify that "natural death has become reasonably foreseeable and is expected to be imminent."

The CMPA also recommends deleting "without a prognosis necessarily having been made as to the specific length of time that they have remaining" from the definition of "grievous and irremediable medical condition" at paragraph 241.2(2)(d). This element of the definition does not assist healthcare practitioners in interpreting the intended meaning of paragraph 241.2(2)(d). It is contradictory to state that no prognosis must have been made but yet require a prognosis that death is foreseeable.

Paragraph 241.2(6)(c) should also be deleted for lack of clarity. The requirement that practitioners must not be connected to the other practitioner or to the person making the request "in any other way that would affect their objectivity" is too vague and subjective to form the basis of a criminal offence. The goal of ensuring that practitioners are independent can reasonably be achieved through the existing criteria in paragraphs 241.2(6)(a) and (b). In addition, regulations should be developed with respect to how healthcare professionals can reasonably confirm that the witnesses are independent pursuant to paragraphs 241.2(3)(c).

Given the potential for criminal prosecution for failing to comply, patients' access to MAID might be affected if practitioners are uncertain about the eligibility or independence requirements. The CMPA is pleased that Bill C-14 is clear regarding other criteria and safeguards, including the age requirement and the issue of advance requests for MAID.

Reasonable But Mistaken Belief (Subsection 241(6))

The protection in subsection 241(6) should be extended to include civil and disciplinary proceedings for practitioners acting in good faith. The provision currently offers protection only from criminal sanctions. Reassuring practitioners that they are protected from criminal sanctions, civil liability and regulatory proceedings when acting in good faith is important in encouraging participation in MAID and ensuring access for patients.

By way of example, the federal *Aeronautics Act* provides such protection for physicians who exercise their duty to report a patient that likely constitutes a hazard to aviation safety. Subsection 6.5(4) of the *Aeronautics Act* states, "No legal, disciplinary or other proceedings lie against a physician or optometrist for anything done by him in good faith in compliance with this section." A similar provision is found in Vermont's end-of-life legislation which states, "A physician shall be immune from any civil or criminal liability or professional disciplinary action for actions performed in good faith

compliance with the provisions of this chapter."[1] To recognize the unique role being played by physicians for their patients, a similar provision should be included in the federal legislation.

Disproportionate Sanctions (Sections 241.3 and 241.31)

The sanctions proposed in section 241.3 and subsections 241.31(4) and (5) are disproportionate to the relatively minor nature of the offences. A maximum penalty of summary conviction punishable by a fine would be sufficient in the circumstances of these offences. As drafted, practitioners could be imprisoned for up to five years for failing to inform a pharmacist that the substance prescribed is intended for MAID, and for up to two years for failing to comply with reporting obligations and contravening regulations regarding the provision and collection of information relating to MAID. Such sanctions are excessive and unnecessary when less onerous punishments would be a sufficient deterrent.

Interaction with Provincial/Territorial Legislation

Bill C-14 should expressly address which law will prevail in the event of a conflict between the *Criminal Code* and legislation enacted by any province or territory regarding MAID. A possible solution is to include in the *Criminal Code* a provision that it will not supplant substantially similar or effectively equivalent provincial/territorial legislation. While not a significant concern where the provincial/territorial legislation is more restrictive than the *Criminal Code*, it is possible that some provincial/territorial frameworks for MAID could be less restrictive than Bill C-14. In those circumstances, access to MAID might be affected if practitioners are uncertain about which legislation will prevail based solely on the doctrine of paramountcy.

For example, Québec's legislation requires that patients be at the "end of life" to be eligible for MAID, and restricts the provision of MAID to situations where the physician administers the drug (i.e., physicians cannot prescribe to patients to self-administer). Bill C-14, on the other hand, would require natural death to have become "reasonably foreseeable" and permits nurses or medical practitioners to either administer MAID or prescribe the lethal substance to the patient to self-administer.

One proposal to address any inconsistencies between the federal and provincial/territorial frameworks is to include in Bill C-14 a provision permitting the recognition of substantially similar or effectively equivalent provincial/territorial legislation where appropriate. Such an approach is not without precedent in Canadian law.

Conscientious Objection

The CMPA recommends that the brief reference to right of conscience in the preamble be expanded given the importance to practitioners that their personal convictions be respected in this area.

Effective and empathetic end of life care requires a strong bond of trust between a patient and his/her physician. In the context of MAID and in support of this trust, the CMPA submits that the federal

[1] *Patient Choice and Control at End of Life Act*, Sec. 1, 18 VSA c 113), §5290.

legislative should address a physician's right on moral or religious grounds not to be compelled to assist a patient to die. The Supreme Court of Canada clearly stated in *Carter v. Canada* that its ruling was not intended to compel physicians to provide MAID.

As such, consideration might be given to including in the preamble to Bill C-14 language similar to the Bill C-14 *Legislative Background* document, to the effect that, "nothing in this Act compels healthcare providers to provide MAID or to otherwise impact their rights under paragraph 2(a) of the *Charter of Rights and Freedoms*." Similar language has previously been used in the preamble of other federal legislation such as the *Civil Marriage Act* which provides,

> "WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;
>
> WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;"

Conclusion

We trust that these comments will be of assistance to the Standing Committee. If the CMPA's experience with medical-legal issues in the end-of-life context might be of further value to the Committee, we would be pleased to provide any other information or input as may be required.

Yours truly,

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Executive Director/Chief Executive Officer

HSS/lg

C. Jessica Richardson, Clerk